

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.K.DENESAN

FRIDAY, THE 18TH AUGUST 2006 / 27TH SRAVANA 1928

WP(C).No. 18777 of 2006(I)

PETITIONER:

MS.J. SREEKALA, STAFF NURSE,
MEDICAL COLLEGE HOSPITAL,
THIRUVANANTHAPURAM.

BY ADV. SRI.DEVAN RAMACHANDRAN

RESPONDENTS:

1. THE STATE OF KERALA, REPRESENTED BY
ITS SECRETARY, MINISTRY OF HEALTH,
SECRETARIAT, THIRUVANANTHAPURAM.
2. THE DIRECTOR OF HEALTH SERVICES,
THIRUVANANTHAPURAM.

BY GOVT. PLEADER MR. MANOJKUMAR.

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION
ON 18/08/2006, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

K.K. DENESAN, J.

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W.P. (C) No.18777 OF 2006 I
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Dated this the 18th August, 2006

J U D G M E N T

What is the effect of Rule 5 of Appendix XIIA referred to in Exception 2 to Rule 88 and Rule 110B of Part I, Kerala Service Rules (for short, KSR) on seniority determined as per Rule 27(c) of Part II of Kerala State & Subordinate Service Rules (for short, KS&SSR)? Is not seniority earned as provided in K.S. & S.S.R. a service benefit? These questions have come up for consideration at the instance of a government employee who is subjected to the rigour of Rule 5 of Appendix XII A of KSR, which directs that the service benefits that had accrued to a probationer prior to his proceeding on leave without allowances for taking up employment abroad or within India, shall stand forfeited.

2. Facts ,in brief, may be stated thus:

The petitioner was advised by the State Public Service Commission as per letter dated 19-4-1989 for the post of Staff Nurse in the Health Services Department. She was appointed as such by the District Medical Officer of Health, Thiruvananthapuram vide order dated 10-5-1989. She joined duty on 18-5-1989 F.N. By Govt. order dated

23-10-1990 she was sanctioned leave without allowances for 5 years for the purpose of taking up employment abroad under the terms and conditions stipulated in Appendix XII A, Part I, K.S.R. Her request for extension of leave under the same terms and conditions was allowed for another 5 years from 20-11-1995 as per Govt. Order dated 16-1-1996 and a further extension for 5 years from 20-11-2000 as per Govt. Order dated 8-2-2001. She sought for permission to rejoin duty on 30-4-2002 after cancelling the unavailed portion of leave. The permission sought for was granted as per order dated 30-5-2002 and she rejoined duty on 18-6-2002. The period of probation for staff nurses is a total period of 2 years on duty within a continuous period of 3 years. The petitioner could not complete the period of probation prior to her proceeding on leave. Hence, after rejoining duty also, she was on probation from 18-6-2002 to 17-6-2004. She became approved probationer with effect from 18-6-2004.

3. In the seniority list of Staff Nurses as on July, 1990, the petitioner's name does not find a place though she had first commenced service as Staff Nurse with effect from 18-5-1989 on the advice of the State Public Service Commission. The petitioner filed representation requesting to include her name in the seniority list taking into

consideration the date of her first effective advice by the P.S.C., namely, 19-4-1989. Her request was rejected as per Ext. P9 letter dated 25-3-2006 of the 2nd respondent informing her that those who had availed leave without allowances for employment abroad before successfully completing the period of probation would be treated as fresh entrants in service on the date of rejoining duty on return from leave and as such she could legitimately claim seniority only with effect from 18-6-2002.

4. The petitioner has sought for a writ of certiorari to quash Ext. P9 and for a writ of mandamus directing the respondents to assign her rank in the seniority list of staff nurses with reference to 19-4-989, the date of first effective advice by P.S.C. for appointment to the post of Staff Nurse.

5. The petitioner's case is that she is not liable to forfeit the seniority earned by virtue of her selection and advice by P.S.C. for appointment to the post of Staff Nurse, for, seniority has to be reckoned with reference to the date of advice in terms of Rule 27(c) of Part II, K.S. & S.S.R. and that the words service benefits in Rule 5 of Appendix XIIA of K.S.R. do not take within its fold seniority.

6. I have heard Shri. Devan Ramachandran, learned

counsel for the petitioner and Shri. Manoj Kumar, learned Senior Govt. Pleader for the respondents.

7. Rule 88, Part I, K.S.R. governs the grant of leave without allowances. Rule 110B of Part I, K.S.R. says that rules for the grant of leave without allowances for taking up employment abroad or within India are given in Appendix XIIA. Rule 4 of Appendix XIIA deals with permanent officers and non-permanent officers who have completed probation in their entry grade and avail leave without allowances. Rule 5 of Appendix XIIA speaks about non-permanent officers in regular service who avail leave without allowances before completing probation in the entry cadre. For the purpose of this case the relevant provision is Rule 5. The same reads:

"In the case of non-permanent Officers in regular service who have not completed probation in the entry grade, leave without allowances may be granted subject to the condition that they will have to start afresh and complete their probation on return from the leave without allowances. In other words, the Officers will forfeit the service benefits that had accrued to them prior to their proceeding on leave and they will be deemed as new entrants to Government service on return from leave. What is protected is only their right to rejoin Government service in the same entry grade as if they were new entrants."

Officers who avail leave without allowances after completing probation come within the purview of Rule 4. They will lose benefits like leave, pension, gratuity,

increment, etc. as also promotion chances as may arise with reference to their seniority in the post from which they proceeded on leave. They shall also lose seniority in the higher grade with reference to their juniors who might get promoted to such grades before they rejoin duty. When compared to Rule 4, the adverse consequences of Rule 5 are graver. Officers who come within the purview of Rule 5 will have to undergo the full period of probation on return from leave. All service benefits that had accrued to them prior to their proceeding on leave will stand forfeited. They will lose the rights and benefits earned till the date of proceeding on leave, except the right to rejoin service in the same grade as new entrants.

8. According to the counsel for the petitioners, seniority is not a service benefit because only those benefits accrued out of service rendered to the Government will come within the ambit of the expression 'service benefits.' It is also contended that the impact of the words 'fresh entrant' will have application only on benefits and rights like leave, pension, pay, increments etc. regulated by Kerala Service Rules and cannot touch the seniority of a government servant determined in terms of Rule 27(c) of K.S. & S.S.R.

9. I am unable to agree with the above contention.

Seniority is an incidence of service as also a condition of service. Seniority as understood in service jurisprudence draws its life from an appointment to a service and grows along with the service. It has no existence de hors service. Ordinarily, the right to earn seniority commences with the commencement of the service of the incumbent and that right runs along with the service. True, there are exceptions to the above general principle. As far as the State Government employees are concerned, Rule 27 of K.S. & S.S.R. governs the situation. Rule 27(c) of K.S. & S.S.R. provides that the seniority of a person appointed to a service, class, category or grade on the advice of the Public Service Commission commences from the date of such advice. Since advice for appointment precedes the date of appointment, it may appear at first blush that there is scope for contending that those covered by Rule 27(c) can claim seniority de hors service. In fact, the petitioner has advanced such a contention. In my opinion, it is a feeble ground which on closer scrutiny will not hold water. The first proviso to Rule 27(c) says that the seniority of candidates who have been granted extension of time to join duty beyond three months from the date of the appointment order, except those who are undergoing courses of study or training which are

prescribed as essential qualification for the post to which they are advised for appointment, shall be determined by the date of their joining duty. It is therefore evident that the date of effective advice loses its relevance in the matter of determination of seniority in cases where the advised candidates do not join duty within the stipulated time limit. This is one of the instances that demonstrates the link between service and seniority despite the fact that under Rule 27(c) the right to count seniority commences from the date of advice by P.S.C. We cannot think of a person claiming seniority in a service or category or grade or post until he joins duty and becomes a member of the service. When regulated by statutory provisions or orders having the force of law seniority becomes a right that could be earned by those in service in terms of the conditions of their service as enjoined by law. The moment the employee ceases to be in service, his right to earn seniority comes to an end. Rule 27 of K.S. & S.S.R. is a regulatory provision prescribing the method to determine the seniority. Though the substantive right to seniority exists de hors Rule 27 which only provides the method to determine or compute the seniority, it is open to the competent authority to lay down the principles governing the determination of seniority and in that

process to specify kinds of service that shall be counted or discounted for seniority. The right to seniority determined in terms of Rule 27 of K.S. & S.S.R. manifests into a concrete or tangible form capable of enjoyment as a service benefit upon the preparation of the seniority list. Once that is done, it becomes the foundation for the enjoyment of other rights like promotion. Hence, it is difficult to appreciate the contention that seniority is not a service benefit. I hold that the words 'service benefits' in Rule 5 of Appendix XII A, K.S.R. take within its fold seniority as well.

10. Now, let us go to the next point. It is not in dispute that the petitioner's case comes within the mischief of Rule 5 of Appendix XIIA. Therefore, except the right to rejoin duty as a new entrant, she has lost all other rights and service benefits. The effect of forfeiture is so pervasive that there is no scope for retaining any right or service benefit except the one specifically protected by the above rule, namely, re-entry into service. The intention of the rule maker is evident from the use of the words 'will have to start afresh', 'will forfeit the service benefits that had accrued to them' and 'will be deemed as new entrants to Government service.' Rule 5 does not admit any room for doubt when it

is made clear that what is protected is only the right of the officers to rejoin government service in the same cadre as if they are new entrants.

11. It is true that as far as the State government employees are concerned, seniority of a person in a service, class, category or grade is determined as provided in Rule 27 of K.S. & S.S.R. Except in the case of persons appointed on the advice of the P.S.C., seniority is determined by the date of the order of his first appointment to such service, class, category or grade as provided in clause (a) of Rule 27 of K.S. & S.S.R. The seniority of a person appointed on the advice of the Commission is determined by the date of his effective advice made for his appointment to the class, category or grade to which he is appointed vide clause (c) of Rule 27 of K.S. & S.S.R. which reads as follows:

"(c) Notwithstanding anything contained in clauses (a) and (b) above, the seniority of a person appointed to a class, category or grade in a service on the advice of the Commission shall, unless he has been reduced to a lower rank as punishment, be determined by the date of first effective advice made for his appointment to such class, category or grade and when two or more persons are included in the same list of candidates advised, their relative seniority shall be fixed according to the order in which their names are arranged in the advice list."

(Provisos omitted).

12. The contention that seniority determined in terms of Rule 27(c) of K.S. & S.S.R. shall stand unaffected despite statutory provisions intended and designed to make inroads into the right to seniority earned by a member of the service, cannot be accepted as a sound proposition. The non-obstante clause with which Rule 27(c) opens would affect clauses (a) and (b) of that Rule but does not control or nullify the effect of other provisions in K.S. & S.S.R. or those in other rules including K.S.R. Rules which govern the service conditions of government servants such as K.S. & S.S.R., K.S.R., K.C.S. (C.C. & A) Rules etc. owe its existence to Article 309 of the Constitution of India and the rule making power of the Government conferred by the Kerala Public Services Act, 1968, Section 2 in particular. The rules thus made, though codified separately, are intended to regulate and govern the service conditions of government servants in the respective fields. It is possible that the aforesaid rules may overlap each other in certain aspects, and sometimes, may appear to be conflicting to each other. In cases where conflict appears between a general rule and a special rule, the well accepted rule of construction is that the special rule will prevail over the general rule. But, as between the provisions of the same enactment or those of a sister

enactment which are intended to operate in the respective fields, with equal force, but overlaps or conflicts with each other, any conflict shall be resolved by harmonious construction. This also is a well settled principle of interpretation of statutes. On a combined reading of the relevant provisions under consideration, it is clear that Rule 27 (c) of K.S. & S.S.R. cannot nullify the effect of Rule 5 of Appendix XIIA, Part I, K.S.R. No irreconcilable conflict comes in the way of resolution. Harmoniously construed, it is just and reasonable to hold that seniority earned and determined in terms of Rule 27(a) or (c), will be lost not only upon reduction to a lower rank as punishment or on mutual or inter-unit or inter-departmental transfer on request by such persons as provided in the aforesaid rule itself, but also by the operation of the rules in Appendix XII A or XII B or XII C of K.S.R. Any understanding to the contrary which would limit the scope of Rule 5 of Appendix XII A of K.S.R. will go against the intention of the rule making authority and the object of that rule. The point is answered accordingly.

13. The contention of the petitioner that her seniority is kept intact despite the conditions prescribed in Rule 5 of Appendix XII A, K.S.R. is liable to be rejected for yet another reason. The effect of Rule 5 is

that the service rendered with all the benefits accrued prior to the enjoyment of leave without allowances will stand severed. Consequently, the officer commences a new service because he is a new entrant in service. The seniority earned by virtue of the prior service will also be lost to the officer, as he is subjected to the conditions laid down in Rule 5. I may point out at the risk of repetition that the only right protected is the right to rejoin the service in the same grade or post as though he is a new entrant to the service. The message sought to be conveyed to those who avail leave without allowances, for certain purposes, before completion of probation, is clear from the language of Rule 5 of Appendix XII A of K.S.R. and the corresponding provisions in Appendix XII B and C of K.S.R.

In the result, the challenge to Ext. P9 fails. The rejection of the claim of the petitioner to assign her seniority with effect from 19-4-1989 in the post of Staff Nurse does not call for interference. The writ petition is dismissed.

K.K. DENESAN
JUDGE

jan/-

